BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE HUTCHISON Claimant VS.	)	
	)	Docket No. 184,879
HARTFORD INSURANCE COMPANY Respondent AND	)	
ITT HARTFORD ACCIDENT AND INDEMNITY Insurance Carrier AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent and its insurance carrier requested review of the Award and Award Nunc Pro Tunc entered by Administrative Law Judge Shannon S. Krysl dated August 7, 1995 and August 10, 1995, respectively. The Appeals Board heard oral argument December 5, 1995.

APPEARANCES

Claimant appeared by his attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Steven C. Alberg of Overland Park, Kansas. The Workers Compensation Fund appeared by its attorney, David J. Bideau of Chanute, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 38 percent work disability. Respondent and its insurance carrier requested review of the following issues:

(1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent.

(2) Nature and extent of claimant's disability, if any.

(3) Whether respondent should receive credit for payments made for long-term disability and severance pay.

(4) The liability of the Workers Compensation Fund.

(5) Whether long distance telephone expense incurred to take certain depositions should be assessed as court costs.

(6) Whether the Order which prohibited the attorneys from personally attending certain depositions denied the parties' due process.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

(1) Claimant contends he injured his back as a result of driving long distances over the course of his employment with the respondent. Claimant began working for the respondent in 1979 as an insurance premium adjuster and regularly drove 700 to 1,000 miles per week to cover his assigned territory.

On July 7, 1992 claimant loaded his car with supplies and began a week long business trip to western Kansas. After driving less than an hour from his home in southeast Kansas, claimant began to experience increasing low-back pain. He stopped at a doctor's office in Augusta and was given an injection. After receiving that medical treatment, claimant continued to Pratt where he spent the night and where he saw a chiropractor who administered cold packs. Claimant proceeded to Liberal where he checked into a motel and canceled his appointments for that afternoon. Because of his increasing back pain, claimant was taken to a Dodge City hospital where he spent two nights. Upon his release from the hospital, claimant's son drove him home.

On July 15, 1992, claimant sought medical treatment from David O. King, D.O., an orthopedic surgeon in Chanute. At his first visit with Dr. King, claimant complained of back and right-leg pain. Claimant told the doctor that he had experienced intermittent back problems for several years and that he drove 45,000-50,000 miles a year in his job. He also told the doctor that he began to experience significant low-back problems on July 7 and began to have great difficulty driving at that time. Dr. King's impression from that initial visit was that claimant had a lumbar radicular syndrome significantly exacerbated by sitting and driving. Over a period of several months, Dr. King provided claimant conservative treatment consisting of medications and physical therapy. The doctor initially released claimant to return to light duty work on October 23, 1992 on a part-time basis with the recommendation that claimant not work more than five hours a day.

Dr. King believes claimant has chronic lumbar radicular syndrome that was more probably than not brought on by claimant's prolonged sitting and driving. He also believes claimant has a 7 percent whole body functional impairment and should permanently refrain from driving more than 12 hours per week. However, he believes claimant retains the ability to lift 20-50 pounds frequently or 50-100 pounds occasionally; carry 20-50 pounds frequently or 50-100 pounds occasionally; bend, stoop, kneel and crouch frequently; and occasionally reach above his shoulders. According to the doctor, claimant should limit his sitting, standing, walking and driving to two hours at a time. The doctor based these opinions upon his clinical examinations and an April 1994 functional capacity evaluation.

Claimant's prior medical history was extensively covered during the litigation of this proceeding. Before July 1992, claimant sought and received intermittent medical treatment for low-back pain for a period of some 30 years. While serving in the U.S. Army in 1960, claimant was in a wreck involving an armored vehicle and sustained a minor back injury.

In 1970 claimant was involved in a head-on car collision and sustained major injuries to his face and upper body. He did not knowingly sustain back injury in that wreck in which others died. In 1989 or 1990, a driver sideswiped claimant's car causing $1,500 damage. Claimant did not require medical treatment for that incident. The record indicates claimant saw a chiropractor in Fort Scott in the early 1960s, a Wichita chiropractor eight times in 1986 and two or three times in 1988, and an Augusta osteopath one time in 1991 for low-back complaints. According to claimant he never missed work due to his back.

Claimant contends he has sustained a compensable injury under the Workers Compensation Act. Respondent contends claimant has had an ongoing low-back problem for a number of years and his present condition is actually related to an injury that claimant sustained over the 1992 Fourth of July holiday. For support of these contentions, respondent primarily relies upon the testimony of Dr. Ronald M. Varner and Dr. Allen J. Parmet.

Dr. Varner saw claimant one time for back pain in January 1991 and a second time on July 7, 1992 when claimant stopped in Augusta for medical treatment during his trip to southwest Kansas. In 1991, claimant told Dr. Varner that he had experienced intermittent back pain for several years. The doctor's notes indicate at the July 7, 1992 visit the claimant told him that his back pain started two days before. On both occasions, Dr. Varner diagnosed lumbar radiculopathy. Claimant denies he told Dr. Varner his back started worsening two days before the July 7, 1992 office visit and does not know where the doctor would have acquired that history. Of course, Dr. Varner does not recall that conversation and must rely on his office notes.

Respondent also presented the testimony of Allen J. Parmet, M.D., who examined and evaluated claimant in March 1995 at respondent's request. Dr. Parmet is board certified in both aerospace and occupational medicine. Dr. Parmet testified that he could not find that claimant had sustained a work-related injury on July 7, 1992, although claimant did have preexisting spinal arthritis and three old compression fractures at the 11th and 12th thoracic vertebrae and the 1st lumbar vertebra. In his letter to respondent's attorney dated March 29, 1995, Dr. Parmet wrote that claimant had a 5 percent whole body disability rating of which "approximately 50% may be attributable to his job-related activities." The doctor was not asked at his deposition whether claimant's extensive driving over the 13-year period he worked for the respondent before July 1992 more probably than not aggravated or otherwise contributed to claimant's back condition.

Based upon claimant's testimony, coupled with Dr. King's, the Appeals Board adopts the Administrative Law Judge's conclusion that claimant met with personal injury by accident arising out of and in the course of his employment with the respondent. The Appeals Board finds it is more probably true than not true that claimant developed chronic lumbar radiculopathy syndrome as a result of the prolonged sitting and driving required by his work for the respondent. The Appeals Board finds that claimant's injury was sustained over a period of time that culminated on July 15, 1992, the date Dr. King took claimant off work.

(2) Because his is an unscheduled injury, the claimant's right to permanent partial general disability benefits is governed by K.S.A. 1992 Supp. 44-510e. That statute provides:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Dr. King released claimant to return to work part time on light duty on October 23, 1992. Claimant testified he performed some work over the phone for approximately three months. At the end of that period, respondent placed claimant on a long-term disability plan which paid claimant 70 percent of his salary. While on long-term disability claimant worked 40 hours per week but was only able to accomplish 40 to 70 percent of his regular work load. Although the record is unclear how much claimant earned while working for the respondent during the period he received long-term disability benefits, claimant indicated he made a majority of his pre-injury salary when adding the long-term disability benefit, but he never received 100 percent of his former wage. In January 1995, respondent determined claimant was no longer eligible to receive long-term disability benefits and suggested that he retire or accept a position in Wichita. Claimant declined the respondent's employment offer because he did not want to relocate from his rural home in the Wilson County area of southeast Kansas and he did not believe he could satisfy company production standards.

Claimant presented the testimony of vocational rehabilitation expert Karen Crist Terrill. Without objection, Ms. Terrill testified that Dr. Hish S. Majzoub had restricted claimant from standing more than one hour in an eight-hour day and from working more than eight hours per day. Ms. Terrill testified that claimant has sustained a 71 percent loss of ability to perform work in the open labor market considering Dr. King's restrictions and a 60 percent loss considering Dr. Majzoub's restrictions.

Respondent argued that Ms. Terrill did not consider Dr. King's actual work restrictions and limitations. After carefully reviewing the record, the Appeals Board finds respondent's argument is without merit. Although Dr. King did not specifically address all the restrictions and limitations set forth in the document entitled Functional Capacities Evaluation which he completed pertaining to claimant, that document was introduced and made a part of the evidentiary record at the doctor's deposition. Respondent also argued that one could not consider Ms. Terrill's opinion of loss of ability to perform work in the open labor market based upon Dr. Majzoub's restrictions because Dr. Majzoub did not testify. Because Ms. Terrill testified to the doctor's restrictions and limitations without objections, the Appeals Board finds respondent's argument fails.

Vocational rehabilitation expert Bud Langston evaluated claimant at the respondent's request and testified that he believes that claimant has sustained a 20 to 34 percent loss of ability to perform work in the open labor market considering claimant's medical restrictions. However, he believes claimant has sustained no loss of ability to earn a comparable wage. Contrary to Ms. Terrill, Mr. Langston considered claimant's open labor market to include more of the state of Kansas than Wilson County where claimant lives and, therefore, began his evaluation with a different pre-injury open labor market.

The Appeals Board is not persuaded that either Ms. Terrill's or Mr. Langston's analysis regarding loss of the open labor market is the more convincing. However, the Appeals Board finds that Ms. Terrill's opinion regarding loss of ability to perform work in the open labor market is somewhat high because she limited claimant's labor market only to Wilson County and finds Mr. Langston's opinion is somewhat low because he eliminated most, if not all, of the jobs in the medium and heavy labor categories from claimant's pre-injury open labor market despite the fact that claimant had no restrictions or limitations to prevent him from performing those jobs. Based upon these circumstances, the Appeals Board finds that both Ms. Terrill's and Mr. Langston's percentages of loss of ability to perform work in the open labor market should be considered and, thus, averaged. Therefore, the Appeals Board finds that claimant's loss of ability to perform work in the open labor market is 47 percent.

The parties stipulated that claimant's average weekly wage on the date of accident was $829.62. Ms. Terrill testified that claimant retains the ability to earn $320 per week based upon his experience and education. Based upon that opinion, which the Appeals Board finds credible, the Appeals Board compares that $320 figure to the $829.62 average weekly wage and finds that claimant has lost 61 percent of his ability to earn a comparable wage. The Appeals Board rejects Mr. Langston's opinion that claimant has sustained no

loss of ability to earn a comparable wage because the greater weight of the evidence indicates that claimant is unable to earn comparable wage in that area considered to be his open labor market.

Based upon the above conclusions and findings, the Appeals Board averages claimant's 47 percent loss of ability to perform work in the open labor market with his 61 percent loss of ability to earn a comparable wage and finds that claimant has a 54 percent work disability for which he is entitled to receive permanent partial disability benefits.

Because respondent offered claimant employment in Wichita, the respondent argues that claimant should be limited to benefits based upon his functional impairment rating only. The Appeals Board disagrees. The rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) is not applicable. In that case an injured worker was limited to disability benefits based upon her functional impairment rating only because she attempted to manipulate her workers compensation recovery by refusing to attempt to perform an accommodated job. Those facts are distinguishable from this proceeding. In the case now before us, claimant declined respondent's job offer because he did not want to relocate to Wichita and did not believe he could satisfy the job's production standards due to his limitations and restrictions. The Appeals Board finds that claimant's rejection of the job offered him was justified and reasonable under the circumstances. Therefore, the rationale of Foulk, does not apply and claimant is entitled to receive permanent partial disability benefits based upon a work disability.

(3) Respondent argues that it should receive credit for the long-term disability benefits claimant received after his injury. The Appeals Board disagrees. The Appeals Board finds that those benefits were not paid as wages, either earned or unearned, for services rendered by claimant but, instead, were paid under some type of disability insurance contract. Under those facts, respondent is entitled to neither a credit nor an offset.

(4) The Appeals Board adopts the analysis, findings, and conclusion of the Administrative Law Judge that the Workers Compensation Fund has no liability in this proceeding.

(5) The Appeals Board also adopts the Administrative Law Judge's conclusion that respondent's long distance telephone expense incurred to take certain depositions should not be assessed as costs.

(6) Respondent has requested the Appeals Board to determine whether the Administrative Law Judge denied the parties due process when she ordered the attorneys to take certain depositions by telephone and prohibited them from attending in person. The respondent does not request any type of relief but merely wants the Appeals Board's opinion regarding the propriety of the Judge's Order. Because this was not an issue presented to the Administrative Law Judge, the Appeals Board will not address it for the first time on appeal. *See* K.S.A. 44-555c, as amended, which limits the Appeals Board review to those questions of fact and law presented to the Administrative Law Judge. Additionally, the Appeals Board does not provide advisory opinions.

The Appeals Board adopts the Administrative Law Judge's findings and conclusions to the extent they are not inconsistent with the specific findings and conclusions made above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated August 7, 1995, and the Award Nunc Pro Tunc dated August 10, 1995, should be, and hereby are, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, George Hutchison, and against the respondent, Hartford Insurance Company, and its insurance carrier, ITT Hartford Accident and Indemnity, for an accidental injury which occurred July 15, 1992 and based on an average weekly wage of $829.62.

The claimant is entitled to 415 weeks of permanent partial general disability benefits at the rate of $298.68, based upon a 54% work disability, not to exceed the maximum benefit of $100,000.

As of August 15, 1996, there is due and owing claimant 213.14 weeks of permanent partial general disability compensation at the rate of $298.68 per week or $63,660.66 which is ordered paid in one lump sum, less any amounts previously paid. The remaining balance of $36,339.34 is to be paid at the rate of $298.68 per week, until the maximum of $100,000 is fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
Steven C. Alberg, Overland Park, KS
David J. Bideau, Chanute, KS
Administrative Law Judge, Wichita, KS
Philip S. Harness, Director